



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | | |
|-----------------------|---|-------------------------------|
| MYRON K. COLEMAN, |) | Case No. CV 08-3130-DDP (RNB) |
| Petitioner, |) | |
| vs. |) | ORDER SUMMARILY DISMISSING |
| P.L. VASQUEZ, Warden, |) | PETITION FOR WRIT OF HABEAS |
| Respondent. |) | CORPUS FOR LACK OF SUBJECT |
| |) | MATTER JURISDICTION |

On May 13, 2008, petitioner filed a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody herein. Petitioner purports to be raising a sentencing error claim based on the Supreme Court's 2007 decision in Cunningham v. California, – U.S. –, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007).

It appears from the face of the Petition that it is directed to the same 2002 conviction as the prior habeas petition filed by petitioner in this Court on June 30, 2003, in Case No. CV 03-4681-DDP (RNB). On December 12, 2003, Judgment was entered in Case No. CV 03-4681-DDP (RNB) denying the petition and dismissing the action with prejudice. Petitioner filed an appeal from that Judgment, but his requests for a certificate of appealability were denied in turn by this Court and the Ninth Circuit.

The Petition now pending is governed by the provisions of the Antiterrorism

1 and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) (“the
2 Act”), which became effective April 24, 1996. Section 106 of the Act amended 28
3 U.S.C. § 2244(b) to read, in pertinent part, as follows:

4 (1) *A claim presented in a second or successive habeas corpus*
5 *application under section 2254 that was presented in a prior*
6 *application shall be dismissed.*

7 (2) *A claim presented in a second or successive habeas corpus*
8 *application under section 2254 that was not presented in a prior*
9 *application shall be dismissed unless--*

10 (A) *the applicant shows that the claim relies on a new*
11 *rule of constitutional law, made retroactive to cases on collateral*
12 *review by the Supreme Court, that was previously unavailable; or*

13 (B)(i) *the factual predicate for the claim could not have*
14 *been discovered previously through the exercise of due diligence;*
15 *and*

16 (ii) *the facts underlying the claim, if proven and viewed*
17 *in light of the evidence as a whole, would be sufficient to*
18 *establish by clear and convincing evidence that, but for*
19 *constitutional error, no reasonable factfinder would have found*
20 *the applicant guilty of the underlying offense.*

21 (3) (A) *Before a second or successive application permitted*
22 *by this section is filed in the district court, the applicant shall*
23 *move in the appropriate court of appeals for an order authorizing*
24 *the district court to consider the application.*

25 ...

26 (C) *The court of appeals may authorize the filing of a*
27 *second or successive application only if it determines that the*
28 *application makes a prima facie showing that the application*

1 *satisfies the requirements of this subsection.*

2 ...

3 (4) *A district court shall dismiss any claim presented in a*
4 *second or successive application that the court of appeals has*
5 *authorized to be filed unless the applicant shows that the claim satisfies*
6 *the requirements of this section.*

7
8 Thus, under § 2244(b)(3)(A), where a federal habeas petitioner seeks to file a
9 subsequent habeas petition raising a claim not raised in the petitioner's prior petition,
10 the petitioner must seek permission from the Circuit to file that second or successive
11 petition. See Cooper v. Calderon, 274 F.3d 1270, 1275 (9th Cir. 2001), cert. denied,
12 538 U.S. 984 (2003). Such permission will be granted only if "the application makes
13 a prima facie showing that the application satisfies the requirements of [Section
14 2244(b)]." See id. Only after the Circuit has made the initial determination that the
15 petitioner has made a prima facie showing under § 2244(b)(2) does the district court
16 have any authority to consider whether the petitioner has, in fact, met the statutory
17 requirements of § 2244(b). Under § 2244(b)(4), the petitioner must make "more than
18 another prima facie showing" in the district court; the "district court must conduct a
19 thorough review of all allegations and evidence presented by the prisoner to
20 determine whether the [petition] meets the statutory requirements for the filing of a
21 second or successive petition." See United States v. Villa-Gonzalez, 208 F.3d 1160,
22 1164-65 (9th Cir. 2000).

23 Since petitioner's prior petition in Case No. CV 03-4681-DDP (RNB) was
24 denied on the merits, this case is distinguishable from the other cases in which
25 permission from the Circuit to file a subsequent petition has been found unnecessary.
26 For example, the Petition now pending does not raise a claim raised in a prior petition
27 that was dismissed without prejudice as unexhausted. See Slack v. McDaniel, 529
28 U.S. 473, 487, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Nor does it raise a claim

1 raised in a prior petition that was dismissed without prejudice as premature. See
2 Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45, 118 S. Ct. 1618, 140 L. Ed. 2d
3 849 (1998).

4 While it does not appear to the Court that petitioner can make the requisite
5 showing that either of his claims “relies on a new rule of constitutional law, **made**
6 **retroactive to cases on collateral review by the Supreme Court**, that was
7 previously unavailable,” that is a determination for the Ninth Circuit to make in the
8 first instance. Petitioner’s failure to secure an order from the Ninth Circuit
9 authorizing the District Court to consider the claims being alleged in the Petition now
10 pending, prior to his filing of the Petition in this Court, deprives the Court of subject
11 matter jurisdiction. See Cooper, 274 F.3d at 1274.

12 IT THEREFORE IS ORDERED that this action be summarily dismissed
13 pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States
14 District Courts.

15 LET JUDGMENT BE ENTERED ACCORDINGLY.

16
17 DATED: 6-5-08

18
19
20
21 Presented by:

22 
23 Robert M. Block
United States Magistrate Judge

24 
25 DEAN D. PREGERSON
26 UNITED STATES DISTRICT JUDGE
27
28